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No. 98-6322

In The
Supreme Court Of The United States
October Term, 1998

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, AND FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, *AMICUS CURIAE,* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

In light of this Court's recent holding in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), does a federal habeas corpus petition, filed following a previous dismissal without prejudice for lack of exhaustion, constitute a "second or successive petition" under Rule 9(b), when such petition has never had any federal habeas corpus review on the merits?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute (TRI) is a non-profit legal and educational organization established in 1982 and based in Charlottesville, Virginia, providing legal services nationwide in defense of civil liberties and human rights. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed numerous *amicus curiae* briefs in the United States Supreme Court, including most recently *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), *Davis v. Monroe County*, Sup.Ct. No. 97-843 (October Term 1998), *State of Wyoming v. Sandra Houghton*, Sup.Ct. No. 99-184 (October Term 1998) and *Kolstad v. American Dental Ass'n*, Sup. Ct. No. 98-208 (October Term 1998), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of 200 civil rights cases nationally.

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[1] The parties have consented to the filing of this brief. Counsel for The Rutherford Institute authored this brief in its entirety, with able research assistance from Jason C. Wiley, Southern Methodist University School of Law, J.D. 1999. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

This Court's opinion in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998) clearly establishes that a federal habeas corpus petition, filed following a previous dismissal without prejudice for lack of state exhaustion, does not constitute a "second or successive petition" under Rule 9(b) of the Rules Governing Section 2254 Cases (herein "Rule 9(b)"). Although *Stewart* was decided under the new rule on "second or successive petitions," its reasoning and conclusion apply equally to the previous rule which governs Mr. Slack's case.

The Ninth Circuit's interpretation of Rule 9(b) is not only contrary to this Court's holding in *Stewart*, but it also constitutes an unjust restriction of the writ of habeas corpus. With an eye toward limiting habeas corpus abuse in capital cases, the Ninth Circuit has fashioned an interpretation of Rule 9(b) which gravely handicaps non-capital defendants such as Petitioner who are not represented by counsel in their habeas corpus actions. For one minor procedural misstep under the Ninth Circuit rule, a hapless *pro se* defendant like Mr. Slack would lose all rights to have his imprisonment reviewed by a federal court.

III. ARGUMENT

A. A federal habeas corpus petition, filed following a previous dismissal without prejudice for lack of state exhaustion, does not constitute a "second or successive petition" within the meaning of Rule 9(b).

In *Stewart v. Ramon Martinez-Villareal*, 523 U.S. 637

(1998), this Court unequivocally announced that "none of our cases . . . have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition." 523 U.S. at ___, 118 S.Ct. at 1622. Over a strong "plain language" objection of two of the Justices, this Court ruled that such a holding was necessary, because "to hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." *Id.*

Mr. Slack's situation precisely fits this Court's description in *Stewart* of a petition not to be considered "second or successive." His initial petition in this case was dismissed without prejudice to allow Mr. Slack to pursue unexhausted state remedies. He returned after exhausting state remedies, seeking a hearing on the merits of his federal habeas corpus petition. With the benefit of this Court's decision in *Stewart*, it is now clear that the district court and the Ninth Circuit should not have dismissed Mr. Slack's current petition as "second or successive."

Respondents argue that *Stewart* is inapplicable to Mr. Slack's case because *Stewart* was decided under a more recent amended law, and because the respondent in *Stewart* was raising a claim that had been dismissed for lack of ripeness rather than for lack of exhaustion. Both of Respondents' arguments lack merit.

It is, of course, true that *Stewart* was decided under the

newer habeas standards of review of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), codified as 28 U.S.C. § 2244(b). It is also undisputed that the AEDPA does not apply to habeas petitions which were pending in federal court prior to its enactment. *Lindh v. Murphy*, 521 U.S. 320 (1997). Mr. Slack's current federal habeas petition was filed prior to 1996, and is governed by the older Rule 9(b) of the Rules Governing Section 2254 Cases. Rule 9(b) provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

However, the fact that *Stewart* was decided under the updated and amended version of this rule, codified as 28 U.S.C. § 2244(b), does not affect the reasoning of this Court with regards to what constitutes "second or successive." The language and meaning of "second or successive" was not changed by the AEDPA. As the Fifth Circuit has recognized, "Section 2244(b) does not define 'second or successive' petition. The specific language in the Act is derived from Rule 9(b), Rules Governing Section 2254 Cases, 28 U.S.C. foll. 2254." *In re Gasery*, 116 F.2d 1051, 1052 (5th Cir. 1997). The Fifth Circuit pointed out that while the AEDPA imposed stricter rules than Rule 9(b) for how the courts treat "second or successive"petitions, "nothing in the AEDPA affects the determination of what constitutes a 'second or successive' petition." *Id.* Furthermore, by its own declaration, this Court was referring to and relying on **pre**-AEDPA caselaw when it proclaimed that "none of our cases

. . . have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition." *Stewart*, 523 U.S. at ___, 118 S.Ct. at 1622. Thus this Court's analysis of what constitutes a 'second or successive' petition under the AEDPA in *Stewart* is directly applicable to the same determination under Rule 9(b).

The Ninth Circuit fails to acknowledge the consistency of the meaning of "second or successive" in 9(b) and 28 U.S.C. § 2244, recognized by this Court and other federal circuits. In a pre-AEDPA case governed by Rule 9(b), *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), the Ninth Circuit held that "abuse of the writ analysis is not foreclosed as matter of law solely because prior petitions have not been reviewed on the merits." *Id.* at 1549. This interpretation, consistent with the Ninth Circuit's ruling in Mr. Slack's case, is in tension with the Ninth Circuit's holding in a post-AEDPA case, *In re Turner*, 101 F.3d 1323 (9th Cir. 1997). The court in *Turner* held that the provisions of the AEDPA that pertain to requirements for filing second or successive habeas petitions "[do] not apply to second or subsequent petitions where the first petition was dismissed without prejudice for failure to exhaust state remedies." The Ninth Circuit has no valid justification for imposing the harsher rule in pre-AEDPA Rule 9(b) cases than this rule it announced in *Turner*.

Respondents' second argument against applying *Stewart* to the instant case fails just as readily. Respondents attempt to distinguish *Stewart* on the grounds that Stewart's previous petition was dismissed for lack of ripeness rather than for lack of state exhaustion. However, this Court has already taken

note of and specifically rejected this argument:

> True the cases are not identical; respondent's *Ford* claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time. But in both situations, the habeas petitioner does not receive an adjudication of his claim.

Stewart, 523 U.S. at ___, 118 S.Ct. at 1622.

In fact, in analyzing Stewart's ripeness claim, this Court looked to long-settled state exhaustion doctrine regarding "second or successive petitions" to make its determination. "We believe respondent's *Ford* claim here -- previously dismissed as premature -- should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies," this Court reasoned. *Id.* A contrary holding, the *Stewart* majority opined, would have "far-reaching and seemingly perverse" implications for habeas practice. *Id.* If the rights of a petitioner returning to federal court after exhausting state remedies were so clear and settled as to have formed the basis for this Court's analysis in *Stewart*, it is disingenuous for Respondent to argue that *Stewart* is inapplicable to the case at bar and that its interpretation of "second or successive" is tenable.

Mr. Slack's petition is therefore governed by this Court's holding in *Stewart* and is not a "second or successive" petition.

B. The Ninth Circuit's interpretation of Rule 9(b), made with an eye toward limiting habeas corpus abuse in capital cases, results in manifest injustice when applied to non-capital defendants such as Petitioner, who are unrepresented by counsel in their habeas corpus actions.

As this Court has recognized, "habeas corpus has traditionally been regarded as governed by equitable principles." *Sanders v. United States*, 373 U.S. 1, 17 (1963). In fact, a procedural default in a habeas corpus petition can be disregarded and a hearing on the merits appropriately held where the prisoner can show that he has suffered a fundamental miscarriage of justice. *Murray v. Carrier*, 477 U.S. 478 (1986). In the charge of Congress to reduce capital habeas corpus petitions from clogging federal courts, and in the effort of courts to heed Congress' instructions, fundamental justice must not be compromised.

Just as the drafters of the AEDPA were intent upon limiting the abuse of the federal habeas corpus system by capital defendants,[2] so the Ninth Circuit undoubtedly had the

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[2]Although the habeas corpus reforms contained in the AEDPA affect many non-capital defendants, abundant evidence demonstrates that Congress was focused on capital cases when it enacted the revisions. The statute's title, Anti-terrorism and Effective Death Penalty Act, describes its purpose. The legislative history and statements made after the Act's passage confirm this intent. Senator Orrin Hatch, for example, declared that "In April 1996 Congress passed the Antiterrorism and Effective Death Penalty Act . . . which accomplished a decade-long effort to ensure that a . . . capital sentence imposed by a state court could be carried out without awaiting the disruptive, dilatory tactics of counsel for condemned prisoners." *Hearings on S.J. Res. 6 Before the Senate Judiciary Committee*, 105th Cong. (Apr. 16, 1997)(statement of Senator Orrin

(continued...)

pressing load of death penalty cases in mind when it interpreted Rule 9(b) so harshly in Mr. Slack's case. However, unlike Mr. Slack, every capital defendant is entitled to qualified legal representation in any post-conviction federal habeas corpus proceeding. 21 U.S.C. § 848(q)(4)(B). In fact, this right to counsel attaches even in the preparation stage, before the federal habeas petition has been filed. *McFarland v. Scott*, 512 U.S. 849 (1994). One may well argue that a capital defendant represented by qualified legal counsel could be expected to comply with the exacting technical standards imposed by the Ninth Circuit's interpretation of Rule 9(b).[3]

Indigent non-capital defendants like Mr. Slack have no such representation. Mr. Slack was required to navigate the treacherous waters of habeas corpus procedure without the benefit of legal education or representation.[4] As the Ninth Circuit itself has acknowledged, habeas corpus is fraught with "barriers of form and procedural mazes" which the writ must overcome. *Brown v. Vasquez*, 952 F.2d 1164, 1166 (1992) (quoting *Harris v. Nelson*, 394 U.S. 286, 291 (1969)).

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[2](...continued)
Hatch), 1997 WL 241160.

[3]Even this argument rings hollow however, when one considers the inexperience of many attorneys who are assigned to capital habeas appeals, and the gravity of the prospect of imposing, without review in federal court, a death sentence on a defendant who may have been unfairly convicted or sentenced in state court.

[4]The district court later appointed counsel to assist Mr. Slack, determining that it was in the best interest of justice to do so. Counsel was not appointed, however, until long after Mr. Slack's first federal habeas corpus petition had been filed and dismissed.

Under these circumstances, the unrelenting interpretation of Rule 9(b) adopted by the Ninth Circuit proves punitive and fundamentally unfair.

Not only does the Ninth Circuit rule violate equity and fundamental principles of justice, but it fails to advance the purposes for which Rule 9(b) was written. The Advisory Committee to the Rules notes that Rule 9(b) incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders*, 373 U.S. 1. In *Sanders*, this Court explained:

> [I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if ... the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. at 18. The evidence in this case demonstrates that Mr. Slack's motives were not to vex, harass, or delay. Nor could his actions be viewed as causing needless piecemeal litigation. Mr. Slack, an unrepresented, non-capital defendant, was in federal court pursuing a habeas corpus petition for less than three months before his petition was dismissed. Recognizing that Mr. Slack's failure to comply with exhaustion requirements was due to ignorance rather than an intent to abuse the system, the district court dismissed Mr. Slack's initial petition without prejudice, granted him

leave to file a later habeas corpus application upon exhaustion of state remedies, and later appointed him counsel in the interests of justice.

Principles of equity and fairness dictate that Mr. Slack and those like him not be barred from ever having their habeas corpus petitions heard on the merits. Mr. Slack should not be permanently deprived of his right to have his case reviewed in federal court as punishment for his failure to master the complexities of federal habeas corpus procedure. If the Ninth Circuit's interpretation of Rule 9(b) is to stand, that court will enjoy a reduction in the number of habeas corpus petitions it must consider. However, the unconscionable cost will be borne by Mr. Slack and other non-capital unrepresented defendants, as well as those capital defendants with incompetent lawyers. These ill-fated prisoners will forever lose their opportunity, guaranteed by the United States Constitution, to have a federal court determine whether they are being unjustly imprisoned by the states.

IV. CONCLUSION

The Rutherford Institute, as *amicus curiae*, urges this court to reverse the ruling of the Ninth Circuit in this case and remand to the Ninth Circuit with directions to remand to the District Court for further proceedings consistent with this Court's decision.

Respectfully submitted,

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